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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Texas

BRIEF FOR THE APPELLANTS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal From the United States District Court for the Southern District of Texas

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the District Court appears at 129 F. Supp. 28 (R. 45-55). The opinion of the Interstate Commerce Commission on reconsideration, which affirmed the prior report of Division 3, appears at 291 I.C.C. 422 (R. 29-35). The opinion of the Commission, Division 3, appears at 287 I.C.C. 403 (R. 21-28). The report proposed by the Commission's Hearing Examiner, which was rejected by Division 3, is annexed as an exhibit to the complaint in the lower court (R. 10-21).

JURISDICTION

The judgment of the three-judge District Court was entered on February 16, 1955 (R. 55-56). On the same date appellants filed their motion for a new trial and to amend findings of fact and conclusions of law (R. 56-60). The District Court entered its order denying that motion on March 28, 1955 (R. 60-61). Appellants filed their notice of appeal on May 17, 1955 (R. 1-2). The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101(b). Probable jurisdiction was noted on October 10, 1955 (R. 152).

QUESTIONS PRESENTED

The questions presented involve a matter of statutory construction and application which arises out of the decision of the Interstate Commerce Commission of January 19, 1954 (291 I.C.C. 422), affirming a prior decision by Division 3 of the Commission of December 22, 1952 (287 I.C.C. 403). That decision denied the relief sought by appellants, who are regulated common carriers by water, in their complaint against Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, The New York Central Railroad Company, and Wabash Railroad Company, all of which are common carriers by railroad operating (so far as concerns the issues of this case) between East St. Louis, Illinois, and Danville, Illinois, and with which appellants connect at East St. Louis.

The matter complained of is the refusal by the said railroads to join with appellants in joint rate arrangements for the transportation of sulphur from Galveston, Texas, to Danville, and the charging by said railroads of their East St. Louis—Danville local

rail rate on ex-barge sulphur originating at Galveston and delivered to them by appellants at East St. Louis, while contemporaneously joining with connecting railroads at East St. Louis in a joint through rate from Galveston and nearby producing points out of which said railroads accept a secret, contractual division less than said local rate. The services rendered by the said railroads from East St. Louis to Danville on the ex-barge sulphur are the same as on the through all-rail sulphur. The Commission held, as a matter of statutory construction, that the circumstances stated did not constitute discrimination in rates and charges between connecting carriers within the meaning of Section 3(4) of the Interstate Commerce Act [49 U.S.C. section 3(4)].

The dismissal of the complaint turned only on a question of statutory construction, the essential facts not being in dispute.

The questions presented by the appeal are:

1. Whether a division of a joint through rate is a "rate" or "charge" within the meaning of those terms as used in Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)].

2. Whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance.

3. Whether the circumstances relied upon by the Commission as warranting the difference in

Incorporated and Dixie Carriers, Inc., operations on the Gulf Intracoastal Canal between Galveston and New Orleans (R. 78). Port Sulphur is about 60 miles below New Orleans (R. 77). The appellants which operate on the Mississippi River join those which operate on the Canal in through service by water from Galveston to East St. Louis (R. 78). They transport sulphur from Galveston on port-to-port rates (R. 76-78; Ex. 1, R. 76, 114) and from Port Sulphur on joint barge-rail as well as port-to-port rates (R. 77; Ex. 1, R. 77, 114). In the period 1947, 1948, 1949 and 1950, the sulphur handled by American Barge Line produced revenue equivalent to 16.6 percent, 11.7 percent, 10.5 percent and 10.6 percent of its total revenues (R. 92).

The railroad appellees[1] operate rail routes from East St. Louis to Danville (R. 77). Those rail routes are available beyond East St. Louis on traffic brought into East St. Louis by barge as on traffic brought in by rail carriers (R. 80).

Sulphur is produced at Port Sulphur and at points in Texas nearby to Galveston. New Gulf, Texas, is a representative mine location (R. 79). The Southern Pacific and the Texas & Pacific in connection with the Missouri Pacific provide rail routes from Texas origins up to East St. Louis and are the railroad connections of the railroad appellees at that point (R. 79).

The difference in the treatment by railroad appellees of appellants as compared with connecting south-

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[1] Chicago & Eastern Illinois Railroad Company, New York Central Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

western rail lines is shown by the following table of rates, such rates, as well as other money figures used herein, being expressed per gross ton of 2240 pounds unless otherwise specified:

Local rates:	All-Rail	Barge-Rail
From Galveston to East St. Louis	$8.736[2]	$5.32[3]
From East St. Louis to Danville	2.95[4]	2.95[4]
Aggregate of *local* rates	$11.686	$8.27
Price Differential when shipped by Barge		1.50[5]
Barge-rail aggregate of locals plus price differential		$9.77[6]
All-rail joint through rate from Galveston to Danville	$9.184[2]	
Shrink in all-rail through rate below aggregate of locals	$2.502	
Shrink in barge-rail through rate below aggregate of locals		0

[2] Ex. 1, R. 76, 114. These rail rates are the same from all sulphur-producing points in Louisiana and Texas.

[3] Barge rate from Galveston to East St. Louis which includes the unloading of the sulphur into cars and the absorption by Federal of switching charges at East St. Louis (R. 83, 84, 85).

[4] Ex. 3, R. 94-95, 115.

[5] This reflects certain costs incurred by the shipper in handling sulphur from mines to storage on wharves at Galveston, Texas (R. 88-89).

[6] Except to the extent that a part of the barge rate may be absorbed by the Galveston shipper (R. 81-82) in competing with the Port Sulphur shipper whose barge rates are $1.01 lower (R. 78), this aggregate of locals via barge-rail plus the price differential is the figure to compare with the all-rail joint rates when measuring the competitive relation between carriers (R. 80-81).

they are to participate in traffic (R. 81). While the differential produced by appellants' proposed rate would be very nearly eliminated by application of that pricing practice, the shipper advised that under the proposed barge-rail rate the barge lines would get some sulphur from Galveston (R. 81, 93). It was explained that this is "because of some absorption made of the charges, transportation charge, from Galveston to New Orleans" (R. 81-82).

Appellants' proposal for a joint barge-rail rate from Galveston to Danville was rejected by the railroads (R. 79). Thereafter the appellant filed a formal complaint against the railroad appellees with the Interstate Commerce Commission which was docketed as No. 30731, *American Barge Line Company* v. *Chicago & Eastern Illinois Railroad Company* (R. 62-64).

The allegations in that complaint (R. 62-64), with respect to violations of section 3(4) of the Interstate Commerce Act are as follows: In paragraph I appellants alleged their status as connecting carriers at East St. Louis of the railroad appellees who were the defendants in complaint (R. 62). The Chicago & Eastern Illinois, in its answer, alleged that it had no information as to the truth or falsity of that allegation (R. 69). The Wabash admitted the allegation (R. 70). The record contains no answer for the other railroad appellees.

The pertinent portions of the allegations in paragraph III read as follows (R. 63):

> That the defendants, to the extent they participate in the transportation, maintain on sulphur in carloads from Galveston, and other origins in Texas to Danville, Illinois, joint rates over

> through all-rail routes while contemporaneously refusing to join complainants in joint differential rates over through barge-and-rail routes from Galveston to Danville . . . that said refusal of the defendants is discriminatory against complainants as connecting carriers, said discrimination being in favor of connecting carriers by railroad with whom said defendants participate in the maintenance of through all-rail routes and joint rates thereover.

The pertinent portion of the allegations in paragraph V read as follows (R. 63-64):

> That by reason of the facts stated in the foregoing paragraphs the defendants . . . are maintaining rates and charges which are discriminatory against complainants as connecting carriers in violation of section 3(4) thereof.

By their complaint, appellants asked the Commission to order defendants "to cease and desist from the aforesaid violations of said Act, and to require the defendants to establish such through routes as the Commission may deem reasonable and just and otherwise lawful." Appellants also prayed "that such other or further order or orders be made as the Commission shall consider proper in the premises" (R. 64).

In paragraphs III and V of their complaint, appellants also alleged that the existing rates over the barge-rail routes from Galveston to Danville are excessive and unreasonable, and that the railroad appellees have refused to establish and maintain reasonable through routes and joint rates, in violation of Sections 1 and 307(d) of the Interstate Commerce Act (49 U.S.C., Sections 1 and 907(d)), and that it is necessary and desirable in the public interest for the

appellants and the railroad appellees to establish through barge-rail routes and joint rates thereover with reasonable differentials under the all-rail rates (R. 63, 64). This brief will take no further note of those allegations nor of the proof with respect thereto. Instead, the subsequent development of the facts, including the proceedings before the Commission and in the lower court, will be primarily concerned with the issue of alleged discrimination between connecting carriers in violation of Section 3(4), that, in the opinion of appellants, being the primary issue before the Court in this proceeding.

Hearing was had before a Hearing Examiner of the Commission at New Orleans, La., on March 13 and 14, 1951. The record there made is a part of the record here (R. 74-118).

The evidence of the appellants on the Section 3(4) issue showed the facts stated above. Appellants believe that none of the evidence offered by the railroad appellees could be characterized as in defense of the alleged violation of Section 3(4). To the contrary, certain of that evidence serves further to establish the existence of such violation.

The following appears on the point in the cross-examination of witness R. L. Sweet, Chief of the Commerce Bureau, New York Central Railroad Company, one of the railroad appellees (R. 103):

> Q. (By Mr. Belnap) Do the defendant railroads object to joining the complaining barge lines in through routes at a single factor joint rate on sulphur from Galveston by East St. Louis to Danville?
>
> A. I don't think so, if we get our $2.95 east of East St. Louis.

Q. You are willing to join a single factor through rate?

A. I wouldn't be in a position to say that, but I don't think there would be any quarrel with lines east of East St. Louis if they get their $2.95.

The following appears in the subsequent cross-examination of the same witness (R. 104):

Q. Do you make your through Danville all-rail by adding the local rate of $2.95 to the $8.736 [rail rate to East St. Louis]?

A. No, sir.

Q. Why do it different with barge lines than rail connections?

A. We don't want to participate with the barge lines and reduce our earnings east of East St. Louis.

Q. You mean it gives you something less than your local rate?

A. That's right.

Q. Don't you participate on that basis with rail lines, taking something less than your local rate?

A. We do.

Later that witness again stated that the rail carriers did not want to receive from ex-barge sulphur "anything less than $2.95 east of East St. Louis" (R. 104). Thereupon, counsel for the railroad appellees said (R. 105):

Mr. Day: Mr. Examiner, Mr. Sweet was only called as a witness to give facts, not to set the policy of any of these Danville lines, and I am going to straighten out the matter of whether he has authority to commit these defendants to join in through rates with the barge lines. I am sure he hasn't got it. We do oppose and resist the establishment of joint rates with the barge lines.

establishment of through routes and joint rates. The question of law as to whether, under the circumstances of this case, a division of an all-rail rate is a "rate" or "charge" as those terms are used in Section 3(4) is not even posed in the opinion.

Because the opinion filed by the lower court did not, at least in specific terms, pass upon the questions urged in the brief and argument before the lower court, appellants filed on February 16, 1955, their motion for new trial and to amend findings of fact and conclusions of law (R. 56-60). The court denied that motion on May 28, 1955 (R. 60-61). This appeal followed (R. 1-3):

SUMMARY OF ARGUMENT

I. The matter complained of before the Interstate Commerce Commission involves discrimination in fact, first with respect to a difference in joint rate arrangements and second with respect to the charge demanded on Galveston sulphur handled ex-barge from East St. Louis to Danville as compared with the lower compensation accepted by the railroad appellees for similar service in the handling of all-rail sulphur from Texas. To the extent that the Commission's order of dismissal is based on the legal theory that such discriminations in fact are not prohibited by Section 3(4) of the Interstate Commerce Act, the order is beyond the power of the Commission and should be set aside.

II. When a carrier refuses without just cause to make joint rate arrangements with one connecting line upon as favorable a basis as with another, Section 3(4) is violated. This has been repeatedly held by the Commission and the Courts when the complainant and

the favored connecting lines were both railroads. *New York & N. Ry. Co.* v. *New York & N.E.R. Co.*, 3 I.C.R. 542. 4 I.C.C. 702 (1891). *Denver and R. G. W. R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611 (1953), order sustained in 132 F. Supp. 72 (1954). Appellants are common carriers by water subject to Part III of the Interstate Commerce Act. By definition added to Section 3(4) in 1940, that status constitutes them "connecting lines" which are entitled to protection against discrimination in rates and charges in favor of connecting rail lines and adverse to them. It follows that to establish a joint rate with a railroad connection well below the combination of local rates which otherwise would apply and refuse, at the same time, without just cause to participate with a barge line connection in any through arrangement other than on the basis of the combination of locals, is, as a matter of law, a category of discrimination in rates and charges which Section 3(4) prohibits. Section 3(4) empowers the Commission to prescribe rates via barge-rail routes lower than via corresponding all-rail routes as a means of curing Section 3(4) discrimination. *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528 (1924). The shrink in the joint all-rail rate below the full combination of locals points to the need of a shrink below the combination of locals via the barge-rail route to accomplish a non-discriminatory relation. While the precise barge-rail rate is for the Commission to decide, it is within the function of this Court to rule that such determination must proceed upon a correct construction of the statute applied to the evidence in the record before it. For the Commission to rule that it had *no* evidence on which to determine a non-discriminatory joint barge-rail rate is, for one thing, to ignore the re-

treatment between appellants and the rail connections of the defendant railroads were legally sufficient for the purpose.

4. Whether the conclusion of the Commission is supported by adequate findings and substantial evidence.

STATUTES INVOLVED

The statutory provision primarily involved is Section 3(4) of the Interstate Commerce Act [49 U.S.C. 3(4)], as follows:

> (4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

The National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001], which by its terms permeates the entire Interstate Commerce Act and governs the administration and enforcement of all of its provisions, is as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this

Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

STATEMENT OF THE CASE

The controversy in this case stems from a difference in treatment by railroads which operate from East St. Louis, Illinois, to Danville, Illinois, of their barge-line connections as compared with their rail-line connections at East St. Louis, in respect to through routes and joint rates on sulphur from Galveston and nearby points in Texas to Danville.

The appellants are those barge-line connections. They are common carriers by water whose operations, in so far as involved in this case, include the following: for Federal Barge Lines, Inc., and American Barge Line Company, operations on the Mississippi River between East St. Louis, Illinois, and New Orleans and Port Sulphur, Louisiana (R. 76, 91); for Coyle Lines

governing statute. *United States* v. *Missouri P. R. Co.*, 278 U. S. 269 (1929). When discrimination which the Act prohibits is present, the Commission is without discretion to withhold relief. *Mitchell* v. *United States*, 313 U. S. 80 (1941).

ARGUMENT

That the evidence before the Commission showed discrimination *in fact* between connecting lines is hardly open to doubt. Such discrimination is clearly present in two forms. *First*, there is discrimination in fact when the railroad appellees refuse to enter into joint rate arrangements with appellants while joining in such joint rate arrangements with connecting lines of railroads. Such discrimination exists (a) by reason of the arrangement in the one case and not in the other and (b) because the combination rate level forced on the barge-rail traffic by the railroad appellees is not on as favorable a basis as the joint all-rail rate level in relation to the all-rail combination of locals. *Second*, there is discrimination in fact when the railroad appellees demand and collect their full local rate of $2.95 from East St. Louis to Danville on Galveston sulphur received from barge lines while accepting, for the same service, a *lesser* amount in the form of a division of a joint rate when sulphur from Texas is received from a connecting rail line. The question for decision as to both types of discrimination is whether, as a matter of law, they are within the purview of Section 3(4).

Discrimination prohibited by Section 3(4) results when a railroad enters into joint rate arrangements with one of its connecting lines (rail or water) and refuses to enter into similar arrangements with another connecting line for the through movement of like traffic between like origins and like destinations under similar conditions

The report of Division 3 devotes one sentence to the issue of discrimination, reading (R. 26-27):

> The record before us . . . affords no basis for a finding of unlawful discrimination under section 3(4) of the act.

In the report of the Commission on reconsideration, the only thing added with respect to discrimination in fact within the first category, is the second sentence in the following finding (R. 30):

> As was found by the division, the record affords no support for a finding that the present combination barge-rail rate, 91.4 cents lower than the present all-rail rate, is unreasonable for the through service offered thereunder. There also is no evidence affording a basis for a conclusion that the proposed difference of $1.514 between the present all-rail rate from Galveston and the suggested barge-rail rate from Galveston, or any particular differential, is required to remove the alleged discrimination against barge lines and to result in rates that would be consistent with the national transportation policy to preserve the inherent advantages of all modes of transportation.

The vice in the above finding, when treated as dispositive of the issue with respect to discrimination in the first category, is that it completely ignores the lack of excuse or justification for the difference in treatment of which appellants complain. In other

words, the reports of the Commission give no recognition to the requirement that joint rate arrangements may not be refused one connection on as favorable basis as is provided for another connection unless there is a showing of just cause by reason of a difference in transportation circumstances.

The only excuse offered for withholding joint rate arrangements from appellants is the insistence of the railroad appellees on collecting their full local rate of $2.95 whenever Galveston sulphur destined to Danville is received from a barge line connection at East St. Louis (R. 103, 104, 111). That motive, a desire for maximum revenue in the handling of ex-barge traffic, does not justify the assailed discrimination.

In the early case of *New York & N.R. Co.* v. *New York & N.E. R. Co.*, 3 I.C.R. 542, 4 I.C.C. 702 (1891), Chairman Cooley wrote for the Commission a lengthy and carefully reasoned opinion on the question of what constitutes "discrimination in rates and charges between connecting lines." That case involved joint rates lower than the sum of local rates with one connection, but not with another (3 I.C.R. 547, 4 I.C.C. 715). In holding that such a difference in treatment constituted discrimination within the meaning of the quoted phrase, Chairman Cooley said (3 I.C.R. 550, 4 I.C.C. 721):

> * * * Discrimination occurs when a difference is made between connecting lines similarly situated. A difference founded on actual dissimilarities in the service, or in the convenience of interchange, and adapted to the difference in circumstances, is not discrimination. But a dissimilarity of this nature arises from physical conditions and not from business motives, and the

While $2.95 is charged on sulphur that comes to East St. Louis by barge, the railroad appellees do not demand that amount as compensation for their services on sulphur brought to East St. Louis by rail. As to such sulphur, they demand and receive for their East St. Louis-Danville services something less than $2.95 as a division out of the $9.184 through rate in which they join southwestern rail connections (R. 104). Divisions between rail lines are not generally published. They are the result of private contractual arrangements and the exact amount of the East St. Louis-Danville all-rail division is not known.

The railroad appellees do join Federal and American in a joint barge-rail rate on sulphur from Port Sulphur to Danville. That rate is $6.66 as compared with the joint all-rail rate of $9.184 (Ex. 1, R. 76, 114; R. 77-78). That joint barge-rail rate was published as a specific rate to Danville at the request of the railroad appellees (R. 77), and for their East St. Louis-Danville service the railroad appellees accept a division of $2.26 (R. 83) and do not demand their local rate of $2.95 (Ex. 3, R. 94, 96, 115).

The Danville receiver obtains his sulphur from Galveston, and at the time of the Commission hearing, it was moving via the all-rail route (R. 93). Prior thereto, there had been a barge-rail movement to Danville via a contract water carrier whose rate from Galveston to East St. Louis was $4.65. On that movement the $2.95 local rail rate from East St. Louis to Danville was collected (Ex. 5, R. 101, 117). The receiver at Danville, who controls the routing of his sulphur, uses about 20,000 tons per year (R. 93).

When the sulphur produced at Texas mines is shipped by water, it first must be shipped by rail from

> discrimination made must be no greater than the different conditions will justify.

At the time of that case the Commission had no power to prescribe any rates. Consequently, the order was to cease and desist from the discrimination found.

The desire of the railroad appellees to collect the $2.95 local rate on Galveston sulphur received from barge lines arises from an asserted business motive, the motive of securing the greatest possible income. Presumably, the railroad appellees believe that sulphur will move via the barge-rail route on that rate because it did so move in connection with another barge line some time prior to the hearing herein. Even if that were true, the business motive cannot justify demanding greater revenue in the case of the ex-barge than in the case of the ex-rail traffic. The application of the full combination of locals via the barge-rail route makes that route less able to attract traffic in competition with the all-rail route than if the railroad appellees entered into joint rate arrangements with appellants on a level below the full combination of locals, just as they do with their railroad connections. An adjustment which has the effect of deterring traffic via one route, when there is no transportation reason for the difference in treatment, results in discrimination which is prohibited by Section 3(4). In the *New York & N.R. Co.* case, *supra*, Commissioner Cooley said (3 I.C.R. 550, 4 I.C.C. 720):

> When, therefore, the Statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates

the mines to Galveston, unloaded from rail car into bins on the wharves; and subsequently loaded from bins into vessels. The price of sulphur at Galveston is $1.50 in excess of the price at the mines by reason of the expense incurred in such handling (R. 88-89).

At the request of the shipper, the appellants asked the railroad appellees to join them in a joint barge-rail rate on sulphur from Galveston to Danville of $7.67 (R. 78, 91-92). That rate was arrived at by adding the customary difference in barge rates, Galveston over Port Sulphur, of $1.01 to the existing barge-rail rate of $6.66 from Port Sulphur to the same destination (R. 78, 92). While the rail lines blanket New Gulf, Galveston, and Port Sulphur at a common rate of $9.184 to Danville (Ex. 1, R. 76, 114), the barge lines maintain higher rates from Galveston than from Port Sulphur in order to compensate the canal carriers for their haul of 357 miles from Galveston to New Orleans (R. 80). If the $7.67-barge-rail rate were agreed to, appellants intended to propose a $2.26 division for the railroads, that being the same as the rail division out of the Port Sulphur-Danville barge-rail rate, but were prepared to negotiate if the East St. Louis-Danville division of the joint all-rail rate differed from that figure (R. 82-83). The cost of handling to interchange with the railroad appellees at East St. Louis would be borne out of the water-lines' share of the joint rate (R. 84).

If that $1.50 price differential at Galveston were added to appellants' proposed rate of $7.67, the total would be $9.17, or 1.4 cents less than the all-rail rate of $9.184. Appellants must have a substantial differential under the corresponding all-rail rate if

> that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the Statute it is only a meaningless enactment.

In *Western Pacific R.R. Co.* v. *Southern Pacific R.R. Co.*, 55 I.C.C. 71 (1919), a divided Commission held, as a matter of statutory construction, that a division of a joint all-rail rate was a "rate" or "charge" within the meaning of those words as used in Section 3(4). Because of strong dissents on that point, Commissioner Eastman thought it appropriate to write a concurring opinion in the course of which he said (84):

> * * * However, this is beside the point, for if a carrier refuses without just cause to make a joint fare with one connecting carrier upon as favorable a basis as with another, which is in substance the allegation in this complaint, it is, I believe, discriminating in its joint "rates and charges," contrary to the provisions of the paragraph in question.

The principle stated in the paragraph just quoted has subsequently been followed by the Commission without exception in cases in which railroads comprised both the favored and the disadvantaged connections.

In *Ann Arbor R.R. Co.* v. *B & O R.R. Co.*, 136 I.C.C. 578 (1927), the Commission held that a refusal to join with one rail connection in joint rates lower than a combination of locals while participating therein with others "constitutes a discrimination in rates * * *

and charges between * * * connecting lines" which the Act expressly forbids.

In *Central R.R. Co. of N.J.* v. *N.Y., N.H. & H. R.R. Co.*, 122 I.C.C. 661 (1927), the Commission said (page 673, italics supplied):

> There can be no dispute over the fact that the New Haven deals differently with complainant in the matter of joint rates than it does with the Lehigh Valley and the Pennsylvania. In the one case there is territorial restriction of joint rates via New York Harbor; in the other cases there is none. The question is whether the differentiation is *without just cause* so that it amounts to the discrimination prohibited by the provision of law above quoted [Section 3(4)].

And at page 674:

> In limiting joint rates with the Jersey Central via New York Harbor for the purpose of restricting the amount of traffic moving through that gateway and at the same time making no similar limitation in the case of the Lehigh Valley and the Pennsylvania, defendants have acted *arbitrarily*. We find that the failure of defendants to accord to complainant *like treatment* with the Lehigh Valley and the Pennsylvania in the matter of joint rates via New York Harbor is discriminatory and unlawful.

The most recent case of importance in which the Commission held that the mere fact of refusing joint rate arrangements to one connection while extending them to another under similar conditions results in discrimination in violation of Section 3(4), is *Denver & R. G. W. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 658, 659, 660 (1953). In that case, after finding as to

the railroads claimed to be guilty of the discrimination that there was no important dissimilarity in transportation conditions surrounding the handling of traffic with the favored connection as compared with the connection excluded from the joint rate arrangements, the Commission at page 660 stated the following conclusion:

> That the maintenance by the Union Pacific and other defendants of joint rates between points in the northwest area, on the one hand, and points on the Bamberger Railroad south of Ogden, on the other hand, while refusing to participate in like rates to and from the same points on the Rio Grande south of Ogden, subjects the Rio Grande to discrimination in violation of section 3(4) of the act.

Upon judicial review, in *Union Pacific Railroad Company, et al.* v. *United States, et al.*, 132 F. Supp. 72, 81-82 (1954), a three-judge court sustained the quoted finding and the order based thereon, and said:

> The Commission found there was no important dissimilarity between the transportation conditions in connection with the Bamberger and those in connection with the Rio Grande. Upon this record that factual conclusion may not be disturbed. Section 3(4) clearly prohibits such discrimination.

The case just cited is now pending on appeal in this Court in Nos. 117, 118 and 119. While that case involves discrimination in the first category as defined at the opening of this argument, it does not involve any claim of discrimination in the second category to be dealt with later in this brief.

The instant case is unlike the cases above cited in two respects. First, those cases involved railroads on both sides, whereas here the discrimination is practiced against a barge line connection and in favor of railroads. Secondly, the joint rate required with appellants to cure the discrimination would be below the corresponding joint all-rail rate. The first factual difference is beside the point since by definition Section 3(4) protects common carriers by water subject to Part III of the Interstate Commerce Act, as well as common carriers by railroad.

The second factual difference cannot warrant the action of the Commission in its outright dismissal of the complaint. In *U. S. War Department* v. *A. & S. Ry. Co.*, 92 I.C.C. 528 (1924), Commissioner Eastman wrote a carefully reasoned opinion as to the application of Section 3(4) (then Section 3(3) to a rate situation in which railroads joined each other in joint rate arrangements and refused to establish differential rates with the barge line which is the predecessor of Federal. The rates involved in that case were depressed below a reasonable level so that the Commission had no basis for an order requiring a joint rate arrangement with the barge line as a matter of reasonableness. That meant, if the Commission were to prescribe differential rates, that it must do so by reason of its power to remedy discrimination in rates or charges between connecting carriers. On that point, Commissioner Eastman, speaking for the Commission, at page 546 (italics supplied) said:

> Paragraph (3) of section 3 of the act, however, provides among other things, that all carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic between

The witness stated on re-direct examination that he was not authorized to say the railroads would be willing to join in any through rates with the barge lines under any terms or conditions (R. 109-110).

Witness George T. Berry, Commerce Agent of the Wabash Railway, was the other witness for railroad appellees. He testified that the Wabash opposed the establishment of a joint barge-rail rate for fear it would have the effect of reducing its present revenue of $2.95 (R. 111), and that in making the all-rail rates to Danville the Wabash did not add its local rate of $2.95 to the rail rate from the Texas mines to East St. Louis (R. 112).

After the hearing, the parties filed briefs and the case was submitted to the Hearing Examiner for a proposed report. The Hearing Examiner ruled in favor of the appellants as to the precise question of law involved in the instant case. His proposed report is Exhibit "B" to plaintiffs' bill of complaint (R. 10-21).

Thereafter the case was submitted on exceptions and reply exceptions to Division 3 of the Commission. Division 3 held, Commissioner Knudson dissenting, that the record afforded "no basis for a finding of unlawful discrimination under section 3(4) of the Act" (R. 27).

Appellants petitioned for reconsideration and oral argument before the entire Commission on the Section 3(4) issue because of the extreme importance of the principles involved.

That petition was granted and such argument was had. During the course of that argument, there was

the following colloquy between counsel for Federal and Commissioner Alldredge (R. 147-148):

> Comm. Alldredge: Are you asking for establishment of joint through rates or simply the removal of discrimination, either that way, or through the establishment of proportional rail rates?
>
> Mr. Belnap: No, we are asking for joint through rates, and urge you that that is the necessary step to remove the discrimination demonstrated.
>
> Comm. Alldredge: If the Commission required the railroads to establish beyond East St. Louis a proportional rate—
>
> Mr. Belnap: Equivalent to their division, that would be one method of curing the thing about which we complain but that isn't the relief we have asked. I don't believe that is really one of the issues of our complaint because our complaint asks for through, joint through rates to cure the discrimination.
>
> Now, on this point—
>
> Commr. Alldredge: You haven't got any general prayer for relief?
>
> Mr. Belnap: Yes, we have asked for such other relief as may seem proper . . .

And also the following colloquy between counsel for Federal and Commissioner Knudson (R. 150):

> Mr. Knudson: You say you rely, Mr. Belnap, exclusively on Section 3(4). Do you mean that the other considerations, some of which were set forth at least in the dissent in the primary case, should be brushed aside now?
>
> Mr. Belnap: No, sir.
>
> Let me say it this way: From the standpoint of the barge lines, we wanted very much to have a completely reasoned opinion from the Commission

Sulphur via East St. Louis to destinations on the line of the railroad appellees which was established at their request (R. 77). To say that there is *no* evidence to afford a basis for a conclusion as to a non-discriminatory barge-rail joint rate is simply not true. Consequently, if the finding referred to is considered to be a finding of fact, then the order should be set aside on the ground that the premise on which it is based is completely contrary to the evidence. Appellants doubt that the Commission intended the finding as one of fact. The report when considered as a whole, clearly portrays a belief on the part of the Commission that the difference in treatment complained of by appellants is not, as a matter of law, within the purview of Section 3(4). If the Court rules that the Commission is wrong, the case must be remanded with directions to the Commission to proceed to a decision upon a correct construction of the statute.

The depressed character of the rail rates affords no justification for the discrimination practiced against plaintiff

In its denial to appellants of the relief sought, the Commission relied in part upon its conclusion that when joint all-rail rates are depressed to meet barge competition, the obligation no longer exists to treat barge line connections as favorably as rail connections. On this point the following appears in the report of Division 3 (R. 27).

> In reaching our conclusions herein we are not unmindful of the provisions of the national transportation policy, which call for a fair and impartial regulation of all modes of transportation subject to the act, so administered as to recognize and preserve the inherent advantages of each. We do not believe, however, that this policy requires us

on this interpretation of Section 3(4), particularly as applied to a situation of this kind. We thought we could achieve that best by confining our petition and our argument to that point.

Following such argument the Commission issued its report on reconsideration, Commissioners Knudson, Mahaffie, and Alldredge dissenting (R. 29-35). In that report, which is the subject of this action, it held that the difference in treatment complained of by appellants does not, as a matter of law, come within the purview of Section 3(4).

Upon the dismissal of their complaint by the Commission, the appellants brought the present action in the United States District Court for the Southern District of Texas against the United States and the Interstate Commerce Commission to set aside the Commission's order (R. 3-10). The railroads which were the defendants before the Commission intervened as defendants (R. 38-41). American Waterways Operators, Inc., an intervener before the Commission in support of complainants, also intervened in the lower court (R. 41-44). Printed briefs were filed. Appellants in their brief challenged the Commission's order primarily on the ground of an alleged misconstruction of Section 3(4) as applied to the facts of record.[7] The District Court, three judges sitting (Hutcheson, Chief Circuit Judge, Connally, and Kennerly, District Judges), dismissed appellants' complaint and handed down a written opinion (R. 45-55). Judgment for the defendants was

[7] Those briefs are not a part of the record. The fact is stated in appellant's motion for new trial and to amend findings of fact and conclusions of law (R. 57.)

to force rail carriers, where they maintain a depressed rate to meet water competition, to further depress their earnings on the traffic in order to favor that same form of competition. Danville is 184 miles from the end of the barge-line service, and the rail rate for that 184-mile haul is depressed at least from 13.5 to 9.2 percent of first class. If the barge lines can reasonably be expected to participate in this movement, the opportunity to do so should be afforded, not by the establishment of a through barge-rail rate differentially under an all-rail adjustment which is already severely depressed, but by a reduction in the barge rate from Galveston to East St. Louis or by an increase in the depressed rail rate, or both. There is no allegation here that the all-rail rate, or any factor thereof, is unreasonably low.

The concept of discrimination bears no relationship to the absolute level of the charges in question. A rate or charge may be reasonable and at the same time discriminatory.

Appellants do not contend here that the $2.95 local rate demanded by defendants on traffic brought from Galveston to East St. Louis by water is unreasonable. Whether it is or is not reasonable is wholly immaterial to the issue of discrimination, which is the principal issue involved in this review. It has been long established that a rate, fare, or charge need not be unreasonable in order to create a discrimination in violation of the statute. In an early case, *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U.S. 263, 277 (1892), the Court said:

> We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust dis-

entered on February 16, 1955 (R. 55-56). The written opinion of the lower court did not deal specifically with the question of statutory interpretation and application which appellants sought to have determined by their suit.

As to the Commission's ruling on the issue under Section 3(4), the lower court said (R. 52):

> When the whole record is considered in the light of all the provisions of the Act and many cases construing same, we think plaintiffs have not shown their claim of discrimination to be meritorious.

Near the end of the opinion, the lower court said (R. 54):

> Neither have plaintiffs shown that the existing rates discriminate against them.

The lower court did not enter findings of fact and conclusions of law apart from its written opinion. The statements quoted above from the opinion appear to be findings of fact. However, the lower court did not note the principal fact on which appellants rely, that is, the acceptance by railroad appellees of a division lower than their local rate when the sulphur is received from a railroad connection, whereas, when received from a water carrier connection, the higher local rate is demanded. The opinion reads as if the lower court were unaware of this difference in treatment and of the question of statutory construction on which the Commission turned its decision. Nor did the lower court appear conscious of the fact that the railroad appellees refuse to treat appellants as favorably as they treat their rail connections in the

lation of the through rates to the combination of locals via the respective routes under consideration. It also ignores the fact that the slower and cheaper service via barge is reflected in barge rates on sulphur lower than all-rail rates for corresponding hauls. For example, the rate on sulphur from Galveston to East St. Louis is $5.32 via barge and $8.736 via rail. From one origin this difference is reflected in joint through rates. For example, from Port Sulphur via East St. Louis to Danville, the joint barge rail rate is $6.66 as compared with $9.184 via all-rail. The Commission had evidence, but chose to dismiss on the legal theory that Section 3(4) did not apply.

III. The Commission found that the joint all-rail rate from Texas to Danville, as well as the local rail rate from East St. Louis to Danville, was depressed below a normal level to meet water competition. That circumstance is held by the Commission to warrant the refusal of the railroad appellees to participate in joint rate arrangements with appellants. Whether a charge or a rate factor is reasonable or not is beside the point when discrimination is involved. Equality of treatment of all connecting lines necessary to avoid a Section 3(4) violation must be practiced whether the rates involved are normal rates or depressed rates. *American Express Co.* v. *South Dakota, ex rel. Caldwell,* 244 U. S. 617 (1916).

IV. The Commission ruled, as a matter of statutory construction, that discrimination which results when a full local rate is demanded from a connecting barge line and a lower division of a joint through rate is accepted as compensation for the same service from a connecting railroad, is not prohibited by Section 3(4). The Commission's theory is that a division of a joint

ate is not a "rate" or "charge" within the meaning of those terms in Section 3(4). On that theory, it dismissed appellants' complaint. The Commission agreed that a difference in divisions without just cause would be discriminatory and that a difference in separately established reshipping rates without just cause would be discriminatory. The Commission erred in making the discrimination prohibited by Section 3(4) dependent on form, rather than substance. The legislative history of the Interstate Commerce Act shows that Congress intended thereby to prohibit every discriminatory act or practice which it had authority to reach. *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342 (1914). The Interstate Commerce Act requires the destruction of all discriminatory practices, whatever their form. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450 (1941). Until the instant case the Commission held that a division was a rate or charge within the meaning of Section 3(4), *Western Pacific R. R.* v. *Southern Pacific Co.*, 55 I.C.C. 71 (1919). In the case of reshipments of grain from Chicago to the East, the effect of the decision of this Court in *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567 (1947), was to require the publication and maintenance of reshipping rates from Chicago on ex-barge grain originating in Illinois identical with the divisions of through all-rail rates which eastern railroads accept out of joint all-rail rates on ex-rail reshipments from Chicago which come from the same origin territory. That application of Section 3(4) required divisions to be treated as "rates" or "charges" within the meaning of that section.

V. The order of the Commission should be set aside because it rests on a mistake of law in construing the

which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act similar to those now in Section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the act were granted.

Discrimination is to be tested by matters of substance, not matters of form. In *New York* v. *United States,* 331 U.S. 284, 296 (1947), this Court said (italics ours):

> The principal evil at which the Interstate Commerce Act was aimed was discrimination *in its various manifestations.*

There, the Court cited *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740, 749 (1931), where it said:

> The legislative history of the Interstate Commerce Act shows clearly that the evil of discrimination was the principal thing aimed at. Senate Report No. 46, 49th Cong., 1st sess., p. 215. See *Kansas City S. R. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573, 597.

In the *Shreveport* case (*Houston, E. & W. T. R. Co.* v. *United States,* 234 U.S. 342, 356 (1914), the Court said (italics ours):

> It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt *any discriminatory action or practice* of interstate carriers affecting interstate commerce *which it had authority to reach.*

In *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 461-462 (1941), the Court took note of the fact that the Interstate Commerce Act had been construed as effective "to accomplish the destruction of discriminatory practices, *whatever their form.*"

The Interstate Commerce Act reflects a clear intent of Congress to embrace within the statutory prohibitions all discriminations which it is within its power to condemn. There can be no more vicious and hurtful discrimination against a connecting carrier than that of the type practiced by the railroad appellees in the instant case.

their respective lines and that they "shall not discriminate in their rates, fares, and charges between such connecting lines." It follows, therefore, that where the rail lines to and from the ports of interchange with the barge line participate with rail lines, operating between such ports, in through all-rail routes and joint rates from and to the points covered by the barge line's petition, we have power, not only to require the establishment of through routes in connection with the barge line, but also to prescribe joint rail-barge-rail rates *which will be nondiscriminatory,* under the above provision of the act, as compared with the corresponding point all-rail rates.

That such a power is desirable in the public interest seems clear, for a water carrier like the barge line must be able to secure traffic to and from interior points if it is to prosper, and in the case of the barge line, with its slow and inferior service, such traffic can not be secured without resort to differential rates. While this does not answer the question as to whether the power exists, it does throw light upon that question. The service rendered by the barge line in connection with the through traffic in question is not the same as the service performed by an intermediate rail carrier between the same points, being both slower and cheaper. In view of this difference in cost and value, the portion of the rail-barge-rail joint rate applicable to barge-line service may reasonably be less than the corresponding portion of the all-rail joint rate applicable to intermediate rail service. It follows from this *that in determining what is necessary in order that discrimination may be avoided,* we may require the rail lines which form part of both routes to join in a lower rate over the rail-barge-rail route.

This Court can deal only with the power and duty of the Commission. It should set aside the Commis-

sion's order dismissing the complaint only if that order is based on a misapprehension by the Commission as to the scope of Section 3(4). If that is found, the case should be remanded to the Commission for further proceedings consistent with the opinion of the Court.

It may be argued that the finding from the report on reconsideration quoted at the beginning of this section of the brief as to the lack of evidence is a finding of fact to which the doctrine of administrative finality applies. But the record shows that there was evidence as to rates and rate relations on which could be determined what joint rate arrangements are required to treat appellants as favorably as the railroad appellees treat their southwest rail connections. Such evidence includes the relation of the barge rates to the rail rates from Galveston to point of interchange. Those barge rates are substantially lower than the corresponding all-rail rates because barge transportation is low-cost transportation. The Commission in its report on reconsideration, based on a study of barge line costs relied upon by appellants, notes that the total cost for moving sulphur by barge from Galveston to East St. Louis and delivering it to the railroad appellees at that point for movement to Danville is $4.32 (R. 33). In comparison, the rail rate from Galveston and Texas sulphur mines to East St. Louis is $8.736 (Ex. 1, R. 76, 114). Such evidence also includes the shrink below the combination of locals which results from the railroad appellees' participation in the all-rail joint rate adjustment. As is noted in the Statement, that shrink amounts to $2.502. Such evidence also includes the joint barge-rail rate of $6.66 (as compared with $9.184 via all-rail) from Port

> crimination or an unreasonable preference under sections 2 and 3.

See also *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U.S. 617, 624 (1916), where the Court said (italics ours):

> Both rates may lie within the zone of reasonableness and yet involve unjust discrimination.

and

> Proceedings to remove unjust discrimination are aimed directly *only* at the *relation of rates.*

The Commission none-the-less notes and seems to rely on the fact that the $2.95 local rate from East St. Louis and Danville is "depressed." (R. 27, 32-33). Certainly it is not depressed to meet any competition from appellants since they are unable to reach that point. In any event, regardless of the asserted depressed character of the local rate, it is an admitted fact that even lower charges are accepted by the railroad appellees in connection with all-rail traffic for the performance of a similar service. Such discrimination is neither explained nor excused by the fact that the charges demanded from plaintiffs may not be on a "maximum reasonable" basis.

Discrimination prohibited by Section 3(4) results when a railroad demands its full local rate on sulphur received from a barge line connection, while accepting as compensation for the same service a lesser amount, in the form of a division when the sulphur is received from a railroad connection under a joint rate arrangement

That discrimination in fact exists when a carrier accepts less for identical service performed on traffic received from one connection than when it is received from another, is apparent. That it exists under

the circumstances of this case is established beyond question, and is recognized by the Commission. That agency's failure to condemn it here is because of its conclusion that in the form practiced it does not, as a matter of law, fall within the prohibition of Section 3(4). This is made plain by the following statement from the report on reconsideration (R. 31):

> The claim here is, not that the complainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*; 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically divisions of joint rates are the result of contractual arrangements between carriers; they are not 'rates' or 'charges' as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pacific R. Co. v. Southern Pac. Co., supra,* upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

In that conclusion the Commission erred, basically, in making the discrimination prohibited by the statute dependent upon its form rather than its substance. In essence the Commission holds that while the law prohibits a discrimination between connecting lines accomplished through differing divisions of joint through rates, and also prohibits discrimination between connecting lines accomplished through different proportional or reshipping rates, it does not prohibit such discrimination if it is accomplished by the device of a division on the one hand and a separately published rate on the other. There exists no reasonable basis in fact or in law for such distinction. This is recognized in the reasoned dissenting opinion of Commissioner Knudson, concurred in by Commissioners Mahaffie and Alldredge (R. 33):[8]

> I am in disagreement with the conclusion reached on the issue under Section 3(4) of the Act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis, and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it is evident that the division is less than the local rate from East St. Louis to Danville, which local rate must be paid by the shipper on this ex-barge traffic.

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[8] Quotation is from official I.C.C. report, 291 I.C.C. 422 (425), which varies slightly in phraseology from earlier mimeographed opinion attached to complaint and reproduced in the Record as an appendix thereto.

In *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carring ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares, and charges between connecting lines," and the term "connecting lines" is therein defined as including common carriers by water subject to Part III of the act. Complainants here are such common carriers. As stated in *Western Pacific R. Co.* v. *Southern Pac. Co.*, 55 I.C.C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to

The basic provisions now found in section 3(4) date from the original Interstate Commerce Act of February 4, 1887, c. 104, 24 Stat. 380. Originally it was the second paragraph (unnumbered) of Section 3. In the Transportation Act of February 28, 1920, c. 91, Section 405, 41 Stat. 479, the paragraph was given the number (3). It was again renumbered as (4) in the Interstate Commerce Act of September 18, 1940, Section 5(e) c. 722, Title I, 54 Stat. 902. At that time, when Part III bringing carriers by water under regulation was also enacted, Congress added to Section 3(4) the definition that "connecting line" embraces "any common carrier by water subject to Part III."

Heretofore, in the few cases in which the question has been raised, both the Commission and the Courts have proceeded upon the premise that divisions are "rates" or "charges" within the meaning of that section.

In *Western Pacific RR. Co.* v. *Southern Pacific Co.*, 55 I.C.C. 71 (1919) cited and relied upon both in the proposed report of the Hearing Examiner and in the dissenting opinion of Commissioner Knudson, the Commission ruled as a *matter of law* that the paragraph made unlawful an unjustified difference in the matter of divisions of joint rates as between different connecting lines. In order to appreciate the full significance of the holding in that case, it is necessary to note the state of the statutory law when that complaint was brought and disposed of. The Act did not treat by specific name with divisions of joint rates as a subject of separate regulation prior to the enactment of Section 15(6) in the Transportation Act

of February 28, 1920, c. 91, Section 418, 41 Stat. 486.[9] Prior thereto, the Act gave the Commission power over divisions by that name only as to the reasonableness thereof in connection with the joint rates being divided,

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[9] Section 15(6) (49 U.S.C. § 15(6) reads as follows:

(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

rather than from the standpoint of relations between connecting carriers.

Section 15(6) gave to the Commission, apart from its power to fix joint rates, power to prescribe "just, reasonable and equitable divisions" of revenue between participating carriers upon giving due consideration to various specified factors. Since Section 15(6) was not a part of the Act at the time the *Western Pacific* case was brought, the complaint was based solely on Section 3 of the Act. The prime question in that case was whether a division of a joint rate is a rate or charge within the meaning of what was then the second paragraph of Section 3. Unless it was, the Commission was wholly without jurisdiction of the case. Under such circumstances, the holding on page 73 of the *Western Pacific* case that

> The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory.

has a significance which is in nowise dependent on the circumstances of the particular case. The holding was one of law on a question of jurisdiction. The Commission's effort here to distinguish that case on the ground that the scope of the statute was determined "under circumstances different from those now before us" must fail.

Appellants appreciate that inconsistency on the part of the Commission in deciding questions involving administrative discretion affords no ground for challenging a Commission order. Plainly, however, that rule cannot apply when the question presented is purely one of law, i.e., the construction of a statute and the jurisdiction of the Commission. No element of ad-

ministrative discretion is involved in such a ruling. If the meaning and application which the Commission gave to Section 3 in 1919 was right, that must be the meaning and application of the unchanged provision in the statute, regardless of the circumstances under which the question of Section 3(4) jurisdiction is raised. The construction given the statute in 1919 has been impliedly sanctioned by Congress in twice re-enacting the statute (Transportation Act of February 28, 1920, *supra*, and Act of September 18, 1940, *supra*) without alteration or limitation in the particulars construed. See *New York, N. H. & H. R. Co.* v. *Interstate Com. Commission*, 200 U.S. 361, 401-402 (1906).

Other cases in which the Commission has dealt directly with a division as a vehicle of discrimination are: *Rates on Railroad Fuel and Other Coal*, 36 I.C.C. 1 (1915), and *The Tap Line Case*, 31 I.C.C. 490 (1914). In both of these Commission cases, reliance was placed upon *The Tap Line* cases (*United States* v. *Louisiana & P.R. Co.*), 234 U.S. 1, 28 (1914). The Supreme Court there stated with respect to the Commission's authority to deal with discrimination accomplished *by means of divisions* (italics supplied):

> * * * That body has the authority, and it is its duty, to reach *all unlawful discriminatory practices* resulting in favoritism and unfair advantages to particular shippers *or carriers*.

In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 225 U.S. 326 (1912) at pages 344-345, this Court noted the power of the Commission to prevent railroads from evading an order dealing with rates on railway fuel by the device of establishing divisions of joint rates in lieu of the separately established rates on railway fuel which had been condemned as dis-

criminatory. In *Rates on Railroad Fuel and Other Coal*, 36 I.C.C. 1, 11-15 (1915), the Commission exercised its power to prevent that evasion.

An admitted discrimination cannot be allowed to escape a condemnation couched in general terms solely by virtue of the label attached to the vehicle chosen by those who would prefer one connection to another. Webster defines a charge as "the price demanded for a thing or service" (Webster's New International Dictionary, 2nd Edition, 1941). The regulatory purpose is defeated by ascribing an artificially restrictive definition to that term as employed by Congress in remedial legislation. The immediate and obvious result of such a narrow construction is to produce a "loophole" for the use and benefit of those seeking to avoid the purpose and intent of the Act.

Those who defend the Commission's action in this case undoubtedly will advance diverse arguments tending to demonstrate the peculiar characteristics of a division. They will assert that Section 15(6) of the Act sets out numerous factors to be considered by the Commission in fixing divisions[10] and further that such considerations lawfully could result in different divisions for the same services upon competitive traffic. To say that these definitive characteristics of a division serve to immunize it from Section 3(4) is a pure *non sequitur*. The Interstate Commerce Act must be construed harmoniously so as to give effect to each of its provisions. Individual sections may not be isolated and administered in a vacuum. True, the Commission is empowered by Section 15(6) upon proper findings to fix divisions which may conceivably vary as be-

[10] This section is quoted in full in footnote 9 on page 41 above.

tween different carrier connections for similar services via the same gateway between the same points, provided there are differences with respect to the criteria stated in Section 15(6). Patently, differing divisions so fixed are not prohibited by Section 3(4). In this proceeding, however, we do not reach that question. The railroad appellees, with the Commission's approval, simply refuse to interchange traffic with appellants under *any* basis of joint rates, insisting instead upon their full local rate. The lower charges assessed upon traffic interchanged with favored rail connections are said to be permissible, not because justifiable by reason of differences in factors specified in Section 15(6), but because without the scope of the Commission's power to cure.

No amount of elaboration upon the distinctions between a rate and a division can alter one whit the plain fact that a division in the normal and usual sense is the charge ("the price demanded for a thing or service") which the carrier recipient accepts for the performance of its transportation services. It obviously is a different *form* of charge than a published point-to-point rate. As between shipper and carrier, it cannot be considered a charge since it is not the price demanded *from the shipper* for a service performed, the shipper being unconcerned with the *apportionment* of the only charge to him, i.e., the through rate. It is also true that the level of a division may be determined, at least in part, by factors not apposite to the construction of published rates. Such factors, however, certainly do not include the only circumstance relied upon by railroad appellees for a difference in their charges, i.e., the nature (whether water or rail) of the inbound transportation agency. The ability of a con-

necting carrier to participate in through transportation is largely dependent on the compensation demanded by the lines with which he connects. He is affected just as much when the compensation demanded from his competitior is in the form of a division which is lower than the local rate demanded from him as he would be if either different divisions or different proportional rates were exacted from him and his competitor.

This is illustrated by the rate structure which was involved in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567 (1947), in which the Court reviewed the order entered by the Commission in *Grain Proportionals, Ex-barge to Official Territory*, 262 I.C.C. 7 (1945).

In that case the Commission had approved, as to grain reshipped from Chicago which originated west of the Mississippi River, higher proportional rates to eastern destinations when the grain arrived at Chicago by barge than when the grain arrived at Chicago by rail. The Commission also had approved those same proportional rates on ex-barge grain originating at points in Illinois. Such ex-barge proportionals were higher than the divisions which the eastern railroads accepted out of joint all-rail rates on grain from the same origins. The Supreme Court sustained the decree of the District Court which set aside that approval by the Commission. The decree so affirmed enjoined the Commission's order insofar as that order

> Prescribes, approves, authorizes, or countenances *in any manner whatever* a charge for railroad services in transporting east from Chicago grain that has arrived there by barge that is higher than any rate or charge that is contem-

> poraneously exacted *in any form or under any guise* for railroad services which do not appear from legally relevant findings of the Commission supported by evidence to be substantially different from railroad services in transporting east from Chicago like ex-rail grain *from like origins* west of Chicago. (Italics supplied.)

In its brief to this Court in that case, the Commission took the position that the proportional rates of eastern railroads on ex-rail grain from origins west of the Mississippi River had the same status as the divisions of the eastern lines out of the joint all-rail rates from Illinois origins. At pages 40-41 of its brief the Commission said:

> Consequently there is no distinction to be made in fact between the charges for transportation from Chicago to the East accruing to the eastern carrier whether they be obtained in the form of a separately established proportional rate or as a division of the joint through rate.

On that premise the Commission contended that the disparity in charges on ex-barge versus ex-rail grain from Chicago to the East was not in violation of Section 3(4) because both the proportional rates and the divisions in the case of ex-rail grain were simply parts of through rates and the lawfulness of the relationship should be tested only from the through rate standpoint.

At page 42 in its brief the Commission said:

> A division of a joint rate is not a proper standard by which to test the lawfulness of separately established rates.

In its decision, the Court did not find it necessary to pass in specific terms upon that contention. However,

the facts in the case before it, the breadth of the decree affirmed, and the condemnation in the opinion of "discriminations . . . accomplished by through rates" make plain that it considered a difference between a division on all-rail grain and a higher proportional on ex-barge grain to be embraced by and offensive to the prohibition against discrimination in Section 3(4) to the same extent as when the difference is between two separately established proportional rates.

In striking down the order of the Commission, the Court said, at page 577 (italics supplied):

> The foregoing provisions flatly forbid the Commission to approve barge rates or barge-rail rates which do not preserve intact the inherent advantages of cheaper water transportation, but discriminate against water carriers and the goods they transport. Concretely, the provisions mean in this case that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain. And Sec. 307(d), authorizing the Commission to fix differentials as between through water-rail and through all-rail rates, does not authorize the Commission to neutralize the effective prohibitions of the other provisions *which were strengthened in 1940 expressly to prevent a discrimination against water carriers.*
>
> The basic error of the Commission here is that it seemed to act on the assumption that the congressional prohibitions of railroad rate discriminations against water carriers were not applicable to such discriminations *if accomplished by through rates. But this assumption would permit the destruction or curtailment of the advantages to shippers of*

cheap barge transportation whenever the transported goods were carried beyond the end of the barge line. This case proves that. * * *

The *Mechling* case stands clearly for the proposition that either a disparity in separately established proportionals, or a disparity between a division of an all-rail rate and a separately published rate applied on the reshipment of barge-arrived traffic, constitutes the type of discrimination which is prohibited by Section 3(4). If that were not the law the railroads could circumvent with impunity the clear intent of the statute as interpreted in the *Mechling* case by the mere device of publishing all-rail joint rates, manipulating their divisions to less than their local rate basis, and simply refusing to enter into similar arrangements with their water carrier connections, as the railroad appellees have done in this case.

The error of the Commission is one of law

In reviewing the report and order of the Commission in the instant case, the Court is not called upon to do more than find that the Commission erred as a matter of law in concluding that the undisputed difference in treatment as between appellants and connecting southwestern railroads constitutes discrimination of the type prohibited by Section 3(4). The failure of the Commission to take jurisdiction and require correction is not a matter of administrative judgment or a question of fact and thus beyond the scope of judicial review. See *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941), wherein the Court, in setting aside an order of the Commission and remanding the cause for further proceedings in conformity with its opinion, said:

> * * * It is enough that the discrimination shown was palpably unjust and forbidden by the Act.

A decision of an administrative body which rests directly on a mistake of law in construing the statute is void and must be set aside. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1929.)

Commission orders have been condemned wherever based upon findings of fact which were not relevant as a matter of law. *Southern P. Co.* v. *Interstate Commerce Commission*, 219 U.S. 433 (1911); *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658, 666 (1930). The same principle applies conversely where the Commission fails to consider facts which are relevant as a matter of law. *Interstate Commerce Commission* v. *Alabama M. R. Co.*, 168 U.S. 144 (1897); *American Trucking Asso.* v. *United States*, 326 U.S. 77 (1945). An order should be set aside when not supported by adequate findings and when the findings entered provide no rational basis for the ultimate conclusion. *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454 (1935); *United States* v. *Carolina F. Carriers Corp.*, 315 U.S. 475 (1942); *Eastern-Central M.C. Asso.* v. *United States*, 321 U.S. 194 (1944). An order which shows an abuse of discretion should be set aside. *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Southern P. Co.* v. *Interstate Commerce Co.*, 219 U.S. 433 (1911).

CONCLUSION

The outstanding fact in this proceeding is that the rail carrier appellees impose upon traffic received from common carrier barge line connections a higher charge than they impose upon the same traffic, received under the same circumstances and conditions from their favored rail connections.

In effect, the Commission has held in its decision here under review that such discrimination is unlawful if it is accomplished by giving one connection a preferential division as compared with the division given another (*Western Pacific* case), that the discrimination is similarly unlawful if accomplished by giving one connection a preferential proportional (or local) rate as compared with the rate given another (*Mechling* case), but that if the discrimination is accomplished by giving the favored connection a preferential division under a joint rate agreement while refusing to afford such an agreement to another, and insisting that the traffic of the less-favored connection be subjected to a higher proportional or local charge for exactly the same service, then the prohibition of Section 3(4) does not apply and the Commission is powerless to order the discrimination removed.

Appellants submit that the Commission has misconstrued the statute and misconceived its power and duty thereunder; that under the plain words of the statute, as applied by the Supreme Court in the *Mechling* case, the mere device of employing a division versus a published rate as the instrument of discrimination does not give it insulation against the condemnation and prohibition clearly intended and provided by the Congress. Accordingly, the decree below should be reversed, this case remanded to the District Court so that the order of the Commission under review may be enjoined, set aside and annulled, and the case

remanded to the Commission for a report therein which will proceed upon a proper construction of Section 3(4).

Respectfully submitted,

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Francis W. McInerny, one of the attorneys for the several appellants on whose behalf the foregoing brief is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing doc-

ument on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

Samuel R. Howell, Esquire
Acting General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Leo H. Pou, Esquire
Assistant General Counsel
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3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

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This, the 27th day of January, 1956.

FRANCIS W. McINERNY